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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CHANGZHOU AMEC EASTERN) Case No. EDCV 11-00354 VAP
TOOLS AND EQUIPMENT CP.,) (DTBx)
LTD.,)
Plaintiff,)
v.)
EASTERN TOOLS &)
EQUIPMENT, INC., A)
CALIFORNIA CORPORATION,)
AND GOUXIANG FAN, AN)
INDIVIDUAL,)
Defendants.)

)

**ORDER DENYING MOTION TO
CONFIRM**

**[Motion filed on April 23,
2012]**

Before the Court is a Motion to Confirm Foreign Arbitration Award ("Plaintiff's Motion") filed by Plaintiff Xuchu Dai ("Plaintiff"), and a Motion for Order Denying Petition to Confirm Foreign Arbitral Award ("Defendants' Motion") filed by Defendants Eastern Tools & Equipment, Inc. and Guoxiang Fan (collectively, "Defendants"). After considering the papers in support of, and in opposition to, the Motions, the Court DENIES Plaintiff's Motion and GRANTS Defendants' Motion.

I. BACKGROUND

A. Procedural Background

3 On March 2, 2011, Changzhou AMEC Eastern Tools &
4 Equipment Co., Inc.¹ ("Joint Venture") filed a Complaint
5 against Defendant Eastern Tools & Equipment, Inc.
6 ("Eastern Tools") and Defendant Guoxiang Fan ("Mr. Fan")
7 seeking to confirm and enforce a foreign arbitration
8 award pursuant to the New York Convention, 9 U.S.C. §§
9 201, et seq. (Doc. No. 1.) Defendants filed an Answer
10 on April 4, 2011, in which they counterclaimed for
11 declaratory relief, arguing the contract at the heart of
12 the foreign arbitration award was signed under duress.
13 (Doc. No. 10.)

15 Plaintiff filed its First Amended Complaint ("FAC")
16 on April 28, 2011, alleging identical claims to enforce
17 the foreign arbitration award under the New York
18 Convention and under the Federal Arbitration Act ("FAA"),
19 but naming Plaintiff as the bankruptcy administrator for
20 the Joint Venture. (Doc. No. 17.)

22 Defendants filed an Answer to the FAC ("Answer to
23 FAC") on May 16, 2011, in which they reiterated their
24 previous counterclaims that the foreign arbitration award
25 should not be confirmed and enforced because the

¹ Plaintiff Xuchu Dai serves as the bankruptcy administrator for the Joint Venture in this action. (See FAC at 1-2.)

1 arbitration agreement was procured by duress, fraud,
2 undue means, and collusion. (Doc. No. 18.)
3

4 On April 23, 2012, Plaintiff filed its Motion to
5 Confirm, (Doc. No. 57), and submitted the following in
6 support:

- 7 1. Declaration of Enoch H. Liang ("Liang
8 Declaration"), (Doc. No. 57-1); and
9 2 Declaration of James Feinerman ("Feinerman
10 Declaration"), (Doc. No. 57-2).

11
12 On April 23, 2012, Defendants also filed their Motion
13 to Deny Confirmation. (Doc. No. 58.) In support of
14 their motion, Defendants attached:

- 15 1. Declaration of Guoxiang Fan ("Fan Declaration"),
16 (Doc. No. 58-1);
17 2. Declaration of Jerome A. Cohen ("Jerome Cohen
18 Declaration"), (Doc. No. 58-2);
19 3. Declaration of Myron Cohen (Myron Cohen
20 Declaration), (Doc. No. 58-3); and
21 4. Declaration of Rodney Bell ("First Bell
22 Declaration"), (Doc. No. 58-4).

23
24 On May 7, 2012, Defendants filed their Opposition to
25 Plaintiff's Motion ("Defendants' Opposition"). (Doc. No.
26 59.) In support of their opposition, Defendants
27 submitted:
28

- 1 1. Declaration of Guoxiang Fan ("Second Fan
2 Declaration"), (Doc. No. 59-1);
3 2. Declaration of Penny Kole ("Kole Declaration"),
4 (Doc. No. 59-2);
5 3. Declaration of Rodney W. Bell ("Second Bell
6 Declaration"), (Doc. No. 59-3); and
7 4. Objections to Plaintiff's Evidence ("Defendants'
8 Objections"), (Doc. No. 59-4).
9

10 Also on May 7, 2012, Plaintiff filed an Opposition to
11 the Motion to Deny ("Plaintiff's Opposition"). (Doc. No.
12 60.) In support of this Opposition, Plaintiff attached:

- 13 1. Declaration of Enoch H. Liang ("Second Liang
14 Declaration"), (Doc. No. 60-1);
15 2. Evidentiary Objections to Jerome Cohen
16 Declaration, (Doc. No. 60-2);
17 3. Evidentiary Objections to Myron Cohen
18 Declaration, (Doc. No. 60-3); and
19 4. Evidentiary Objections to Fan Declaration
20 ("Plaintiff's Objections to Fan Declaration"),
21 (Doc. No. 60-4).

22
23 On May 14, 2012, Defendants filed their Reply in
24 support of their Motion ("Defendants' Reply"). (Doc. No.
25 61.) In support of their Reply, Defendants submitted:

- 26 1. Declaration of Rodney Bell ("Third Bell
27 Declaration"), (Doc. No. 61-1); and
28

1 2. Response to Plaintiff's Evidentiary Objections
2 to: Fan Declaration; Jerome Cohen Declaration,
3 and Myron Cohen Declaration ("Defendants'
4 Response to Plaintiff's Objections"), (Doc. No.
5 61-2).

6

7 Also on May 14, 2012, Plaintiff filed a Reply in
8 support of its Motion ("Plaintiff's Reply"). (Doc. No.
9 62.) In support of its Reply, Plaintiff attached:

- 10 1. Reply to Defendants' Evidentiary Objections,
11 (Doc. No. 62-1); and
12 2. Declaration of Enoch H. Liang ("Third Liang
13 Declaration"), (Doc. No. 62-2).

14

15 On May 31, 2012, the Court ordered the parties to
16 resubmit their evidence in the format specified by the
17 Court's Local Rules governing motions for summary
18 judgment and this Court's standing order. (Doc. No. 65.)
19 In accordance with this order, Plaintiff filed a
20 Statement of Undisputed Facts in support of the Motion to
21 Confirm ("Plaintiff's SUF") on June 18, 2012. (Doc. No.
22 66.) Defendants filed a Statement of Undisputed Facts in
23 support of the Motion to Deny ("Defendants' SUF") on June
24 18, 2012, as well. (Doc. No. 67.)

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1 On June 25, 2012, Defendants filed a Statement of
2 Genuine Issues in support of Defendants' Opposition
3 ("Defendants' SGI"). (Doc. No. 68.) Defendants attached
4 to their SGI their Objections ("Defendants' Objections")
5 to Plaintiff's SUF. (Doc. No. 68-1.) Also on June 25,
6 2012, Plaintiff filed a Statement of Genuine Issues in
7 support of Plaintiff's Motion to Confirm ("Plaintiff's
8 SGI"). (Doc. No. 69.)

9

10 On July 2, 2012, Plaintiff filed a Reply Statement of
11 Undisputed Facts in support of the Motion to Confirm
12 ("Plaintiff's Reply SUF"). (Doc. No. 71.) In support,
13 Plaintiff submitted a Reply to Defendants' Objections.
14 (Doc. No. 71-1.) The same day, Defendants filed a Reply
15 Statement of Undisputed Facts in support of the Motion to
16 Deny ("Defendants' Reply SUF"). (Doc. No. 72.)

17

18 **B. Preliminary Evidentiary Issues**

19 The Court addresses only those objections relating to
20 evidence the Court found necessary to consider in ruling
21 on the Motions.

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1 **1. Declaration of Guoxiang Fan**

2 Plaintiff objects to certain statements in Mr. Fan's
3 Declaration on the basis that these statements are
4 hearsay.² Specifically, Plaintiff objects to:

- 5 1) Paragraph 15: "the police supervisor told me
6 that the investigation had been finished. He
7 told me that I would not be released until I
8 signed an agreement."
- 9 2) Paragraph 18: "I was told by the police
10 supervisor that I would have to wire the money
11 to an account before I would be released."
- 12 3) Paragraph 24: "I was told by the police
13 supervisor that I would have to wire \$300,000 to
14 a certain account before I would be released."
- 15 4) Paragraph 25: "I was not released from police
16 custody until the police confirmed that the
17 \$300,000 had been received in the account."
- 18 5) Paragraph 26: Mr. Fan's description of telephone
19 conversations with the Changzhou Public Security
20 Bureau and Officer Huang.

21 (Pl.'s Objections to Fan Decl. at 2-3.)

22

23 Defendants argue these statements are not hearsay
24 because they are not submitted for the truth of the
25 matter asserted, but instead to show Mr. Fan's state of

27 ² The Court addresses only those objections to
28 statements which the Court considers as material in
ruling on the Motions.

1 mind and the voluntariness of his subsequent conduct.

2 (Defs.' Response to Pl.'s Objections at 2-3.)

3

4 Hearsay is an out of court statement that "a party
 5 offers in evidence to prove the truth of the matter
 6 asserted in the statement." Fed. R. Evid. 801(c)(2).
 7 Where a party attempts to introduce a statement that is
 8 offered not to prove the truth of the statement, but
 9 instead to show a party's state of mind, that statement
 10 is not hearsay. See United States v. Brown, 562 F.2d
 11 1144, 1148 (9th Cir. 1977) (defendant's request that
 12 witness "[not] hurt him" was non-hearsay; admissible to
 13 show defendant's state of mind). Orders, instructions,
 14 or directives, "which by their nature are neither 'true'
 15 nor 'false,'" do not constitute hearsay if the statements
 16 are admitted to show the circumstantial intent of the
 17 declarant rather than a factual assertion. Mendez v.
County of Alameda, No. C03-4485 PJH, 2005 WL 3157516, at
 *14 (N.D. Cal. Nov. 22, 2005); see also United States v.
Shepherd, 739 F.2d 510, 514 (10th Cir. 1984); United
States v. Keane, 522 F.2d 534, 558 (7th Cir. 1975),
overruled on other grounds by, McNally v. United States,
 483 U.S. 350 (1987). In these instances, the credibility
 24 and the reliability of the declarant is not at issue.
 25 Rather, the only credibility question presented is
 26 whether the statements were made at all and if so, under
 27 what circumstances.

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1 Addressing each statement in turn, in paragraphs 15,
2 18, and 24, Mr. Fan describes warnings, orders, or
3 instructions which the declarant, the Changzhou police
4 supervisor, made to him while he was in detention.
5 Defendants offer these statements not to show the truth
6 of the statements - that the police would not release him
7 - but rather, to show Mr. Fan believed he would not be
8 released unless he signed the agreement and wired the
9 money. These statements are therefore not hearsay and
10 are admissible.

11

12 Similarly, Defendants submit paragraph 25 not to
13 prove that \$300,000.00 was in fact wired to the specified
14 account, but rather, to show that Mr. Fan believed he was
15 being released only after the police confirmed the
16 receipt of the wired money. The only credibility
17 question concerns the truthfulness of Mr. Fan's statement
18 that this confirmation occurred. Accordingly, the
19 statement is not hearsay.

20

21 In paragraph 26, Mr. Fan states that he was contacted
22 at least 10 times over the telephone by the Changzhou
23 Public Security Bureau between April and July 2007. (Fan
24 Decl. ¶ 26.) According to the declaration, Officer
25 Huang, one of the police officers in Changzhou, also
26 called Mr. Fan in July and told him to come back to
27 Changzhou to sign the agreement again. (Id.) Mr. Fan
28

1 asserts he did not want to sign the agreement, but knew
2 that if he did not, he would be taken back into custody.
3 (Id.) For the same reasons as explained above, this
4 paragraph is not hearsay. Mr. Fan's statement about
5 Officer Huang describes an order or instruction he
6 received. Likewise, Mr. Fan's statements about his own
7 state of mind upon receiving telephone calls from the
8 Public Security Bureau and Officer Huang do not
9 constitute hearsay.³

10

11 **2. China International Economic and Trade**
12 **Arbitration Commission ("CIETAC") Arbitration**
13 **Award**

14 Defendants object to certain statements of fact set
15 forth in the Arbitration Award as inadmissible hearsay.
16 (Defs.' Objections at 2-4.) Specifically, Defendants
17 object to facts numbered 40, 41, 45, and 46 in
18 Plaintiff's SUF: "Defendants selected one member of the
19 three-person arbitration panel: Mr. Zhang Yuqing"; "Two
20 of the three arbitrators - Sun Nanshen (selected by

21

22 ³ At the hearing, Plaintiff argued that under this
23 hearsay exemption Mr. Fan could claim the police told him
24 anything - no matter how incredible - and it would still
25 be admissible. This argument, however, misconstrues the
26 method for presenting evidence in a summary proceeding
27 such as this. Plaintiff had the opportunity to cross-
28 examine Mr. Fan during his deposition, and thus, could
have tested the credibility of Mr. Fan's statements then.
Plaintiff also could have disputed the facts stated in
Mr. Fan's declaration by submitting contradictory
declarations or deposition testimony from the Changzhou
police, Officer Huang, or Mr. Dai, as well as any other
relevant evidence. Plaintiff did not do so.

1 Plaintiff) and Zhang Yuqing (jointly selected by the
2 Defendants) - are well-known and respected arbitrators in
3 the international arbitration community"; "The CIETAC
4 arbitrators noted that all parties' counsel made
5 arguments, answered the panel's questions, and cross-
6 examined the evidence"; and "During the arbitration,
7 Defendants' counsel 'confirmed in open court that they
8 will no longer challenge the jurisdiction of [CIETAC
9 Shanghai] on the case.'" (Id.)

10

11 It is not the Court's role to review the arbitration
12 award or the merits of its findings in ruling on whether
13 a party has established a defense under Article V of the
14 New York Convention. See China Nat'l Metal Prods.
15 Import/Export Co. v. Apex Digital, Inc., 379 F.3d 796,
16 799-800 (9th Cir. 2004) ("Our review of a foreign
17 arbitration award is quite circumscribed. Rather than
18 review the merits of the underlying arbitration, we
19 review de novo only whether the party established a
20 defense under the Convention.") (citations and internal
21 quotation marks omitted); see also Ministry of Defense of
22 the Islamic Republic of Iran v. Gould, Inc., 969 F.2d
23 764, 770 (9th Cir. 1992). In determining whether to
24 enforce an award, the Court may consider the facts as
25 presented in the parties' motions, submitted deposition
26 testimony, declarations, and documents to determine
27 whether one of the defenses applies. See Matter of
28

1 Arbitration Between Trans Chemical Ltd. and China Nat.
 2 Machinery Import and Export Corp., 978 F. Supp. 266, 309
 3 (S.D. Tex. 1997) ("The Convention mandates a summary
 4 procedure modeled after federal motion practice to
 5 resolve motions to confirm."). Thus, to the extent
 6 Defendants object to the admission of CIETAC's
 7 determinations with respect to their duress counterclaim,
 8 this objection is moot; and to the extent Defendants
 9 object to CIETAC's findings regarding Defendants'
 10 participation in the arbitration process, these
 11 objections are also moot as the Court may consider
 12 Article V defenses regardless of whether the parties
 13 objected to arbitration.⁴ See, e.g., Slaney v. Int'l
 14 Amateur Ath. Fed'n, 244 F.3d 580, 592 (7th Cir. 2001)
 15 (dealing separately with objecting party's arguments
 16 concerning the arbitration panel's decision and the
 17 party's Article V defenses).

18
 19 Furthermore, under Article V, a successful defense
 20 may result in a court refusing to recognize or enforce an
 21 award. Convention, art. V(1) ("Recognition and
 22 enforcement of the award may be refused").
 23

24 ⁴ The question of whether the parties agreed to
 25 arbitrate presents a distinct jurisdictional question.
 26 See China Minmetals Materials Imp. and Exp. Co. v. Chi
Mei Corp., 334 F.3d 274 (3d Cir. 2003). In cases where
 27 courts consider the threshold issue of arbitrability,
 whether the party seeking denial of confirmation objected
 throughout the arbitration proceeding may be relevant.
 28 See, e.g., id. at 278; Czarina, LLC v. W.F. Poe
Syndicate, 358 F.3d 1286, 1294 (11th Cir. 2004).

1 Accordingly, if Defendants establish a defense of duress
 2 under Article V, the Court may refuse to recognize the
 3 arbitration award in its entirety. CIETAC's findings
 4 about the validity of the underlying agreement therefore
 5 cannot control the Court's ruling on the merits of
 6 Defendants' defense when considering whether the award
 7 contravenes public policy under Article V.

8

9 **3. Shanghai Court Judgment**

10 Defendants contend the July 21, 2010, Judgment of the
 11 Shanghai City, Second Intermediate People's Court is
 12 inadmissible because it lacks the proper authentication
 13 under Rule 902. (See Defs.' SGI ¶ 52.) Plaintiff
 14 responds that the deposition testimony of Mr. Dai
 15 authenticates the judgment. (Pl.'s Reply SUF ¶ 52.)

16

17 First, Plaintiff does not include the Shanghai Court
 18 Judgment as an exhibit to any of the documents filed in
 19 support of, or in opposition to, these Motions.⁵ Rather,
 20 Plaintiff references an exhibit of a declaration attached

21

22

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⁵ In its Order setting the briefing schedule, the Court made clear that the parties must cite to specific page and line numbers in depositions and paragraph numbers in affidavits. (May 31, 2012, Order (Doc. No. 65) at 4.) The Court further noted that if either party failed to provide a pincite to the supporting evidence, the Court would deem the proffered fact (or dispute) unsupported. (Id. (citing Christian Legal Soc. v. Wu, 626 F.3d 483, 488 (9th Cir. 2010) ("Judges are not like pigs, hunting for truffles buried in briefs."))).

1 to a discovery motion filed in November 2011. (See Pl.'s
2 Reply SUF ¶ 52 (citing Doc. No. 44, Ex. D).)

3

4 Secondly, even if Plaintiff had filed the exhibit
5 properly, the document is not admissible. As stated
6 above, under Rule 902(3), a foreign public document is
7 self-authenticating only if it is accompanied by a final
8 certification of either the signer or attester who
9 executed the document in his official capacity and is
10 authorized by the laws of that country to make the
11 attestation or execution, or of a foreign official whose
12 official position relates to the execution or
13 attestation. Fed. R. Evid. 902(3). In fact, Plaintiff
14 admits the document is not self-authenticating, but
15 contends the testimony of Mr. Dai authenticates the
16 judgment. (Pl.'s Reply SUF ¶ 52.)

17

18 Under Rule 901(a), extrinsic evidence in the form of
19 testimony may sustain a finding of authenticity, but only
20 if the testimony is "sufficient to support a finding that
21 the matter in question is what the proponent claims."
22 Fed. R. Evid. 901(a). A court is not required to accept
23 the testimony as true, but rather, "must assess the
24 credibility of that testimony and determine whether the
25 balance of the evidence is sufficiently compelling" to
show the documents are what the party claims them to be.
Vatyan v. Mukasey, 508 F.3d 1179, 1185 (9th Cir. 2007);

28

1 see also United States v. Perlmuter, 693 F.2d 1290, 1292-
2 93 (9th Cir. 1982) (finding testimony of Immigration and
3 Naturalization Service agent insufficient).

4

5 Here, Plaintiff cites to statements Mr. Dai made
6 concerning litigation of the arbitration award. (Pl.'s
7 SUF ¶ 52.) Specifically when asked if "something about
8 the arbitration award" was litigated, he responded, "the
9 two respondents applied to Shanghai Second Intermediate
10 People's Court to withdraw, to withdraw -- to withdraw
11 this arbitration judgment." (Dai Dep. 117:9-17.) It is
12 not clear from the deposition testimony, however, whether
13 Mr. Dai was referring to a document containing the
14 judgment. (Id.) To the contrary, the testimony suggests
15 Mr. Dai was speaking generally from his memory as to
16 whether the parties litigated the arbitration award.
17 (Id.) Nothing in Mr. Dai's testimony therefore
18 establishes that Exhibit D is what Plaintiff claims it to
19 be. As no credible extrinsic evidence authenticates the
20 Shanghai Court Judgment, and the document is not self-
21 authenticating, the Court finds it is not admissible for
22 purposes of ruling on these Motions.

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1 **C. Findings of Fact**

2 The facts relevant to enforcing the arbitration award
3 are not in dispute.⁶ The following material facts are
4 supported adequately by admissible evidence and are
5 uncontroverted.

6

7 This action arises from a contract dispute over the
8 return of allegedly non-conforming goods. Defendant
9 Eastern Tools imports and distributes gasoline-powered
10 generators and related equipment. (Fan Decl. ¶ 4.)
11 Between 2003 and 2006, Eastern Tools purchased the
12 majority of this equipment from the Joint Venture. (Id.
13 ¶ 7.) According to Eastern Tools, it stopped purchasing
14 from the Joint Venture after discovering the equipment
15 did not conform to the contract specifications and had
16 quality problems. (Id.) Eastern Tools then sought
17 payment for the storing, shipping, and repairing of
18 returned shipments of the allegedly non-conforming
19 equipment. (Id. ¶ 8.) The Joint Venture in turn
20 demanded Eastern Tools pay for these same shipments,
21 denying the goods failed to meet specifications. (Id.;
22 Pl.'s SUF ¶ 4.)

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27 ⁶ To the extent any facts in the SUFs, SGIs, or Reply
28 SUFs are not mentioned in this Order, the Court has not
relied on them in reaching its decision.

In an attempt to settle the dispute, the parties took part in a series of negotiations which culminated in the drafting of an agreement in December 2006. (Fan Decl. ¶ 11; Pl.'s Mot. at 3.) The draft agreement provided that Eastern Tools would keep the allegedly defective equipment and pay the Joint Venture \$2 million for the merchandise.⁷ (Fan Decl. ¶ 11; Pl.'s Mot. at 3.) The parties did not sign the agreement, however, and in February 2007, the Joint Venture filed for bankruptcy. (Fan Decl. ¶ 11; Pl.'s Mot. at 4.)

1. April 2007 Agreement

13 On April 17, 2007, Changzhou police arrested⁸ Eastern
14 Tools's President, Mr. Fan, in Changsu, People's Republic
15 of China.⁹ (Fan Decl. ¶ 12.) The police drove him to

⁷ Mr. Fan asserts in his declaration that he was willing to make this agreement in order to help the Joint Venture - Eastern Tools's sole supplier - stay in business. (Fan Decl. ¶ 11.) He also believed Eastern Tools would be able to recover some of the funds by repairing and selling the equipment. (Id.)

⁸ Plaintiff refers to Mr. Fan's arrest by the euphemism "residential surveillance," and claims Mr. Fan's agreement to pay Plaintiff \$2.5 million to secure his release was actually a Chinese version of a "negotiated plea agreement." (Pl.'s Mot. at 4; Pl.'s Opp'n at 7.) As discussed at length below, whether or not Mr. Fan's arrest was legal under Chinese law, a valid contractual agreement between two private parties is not formed when one party signs in order to secure his or her release from imprisonment, or signs under threat of imprisonment.

1 Changzhou and placed him in a detention facility. (*Id.*
 2 ¶¶ 12-13.) The police told him that he was being held
 3 for criminal fraud and asked him to give a statement
 4 about the dispute between Eastern Tools and the Joint
 5 Venture. (*Id.* ¶ 14.) The police also confiscated Mr.
 6 Fan's phone. (*Id.* ¶ 13; Defs.' Reply SUF ¶ 11c.) The
 7 police informed Mr. Zhu, Eastern Tools's China
 8 representative, that Mr. Fan was being held for economic
 9 fraud.¹⁰ (Zhu Dep. 8:20; 60:14-61:17.)

10

11 On April 26, 2007, while Mr. Fan was still in police
 12 custody, Plaintiff Xuchu Dai met with him to discuss a
 13 new agreement to resolve the dispute between Eastern
 14 Tools and the Joint Venture. (Dai Dep. 37:10-24.) Mr.
 15 Dai testified that at the time he believed Mr. Fan was in
 16 custody because one of the shareholders in the Joint

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18 ⁹(...continued)
 19 As Defendants note correctly, however, whether Mr. Fan
 20 signed the April 2007 contract in order to secure his
 release from prison is relevant to show his state of mind
 when the police directed him to return and sign the July
 2007 Agreement. (*See id.*)

21

22 ¹⁰ Plaintiff argues Defendants' claim that Mr. Fan
 23 was held without charges is false. Yet Plaintiff does
 not cite to any evidence demonstrating the Changzhou
 24 Police actually charged Plaintiff with a crime. (*See*
 Pl.'s Opp'n at 6.) Plaintiff provides only a
 "Notification of Release," a document which does not
 charge Mr. Fan with a crime, but states merely that Mr.
 25 Fan was placed under "residential surveillance" on
 "suspicion of contract fraud." (Third Liang Decl. Ex. 1
 26 (English translation).) In fact, the Notification of
 Release acknowledges there was "insufficient evidence" to
 warrant Mr. Fan's continued detention. (*Id.*) The
 27 police's purported reason for arrest does not, on its
 28 own, constitute a "charge."

1 Venture had accused Mr. Fan of contract fraud.¹¹ (Dai
2 Dep. 51:1-14.)
3

4 The police permitted an attorney, Wu Jian, to visit
5 Mr. Fan briefly during his detention. (Defs.' Reply SUF
6 ¶ 11g.) The police monitored the visit and Mr. Wu
7 testified at his deposition that he was only allowed to
8 advise Mr. Fan to sign the April 2007 Agreement. (Wu
9 Dep. 35:7-16.) When Mr. Wu began to ask Mr. Fan about
10 the charges brought against him, the police told him to
11 stop, and then pushed him out of the room. (Wu Dep.
12 35:7-25; 36:1-5.)

13
14 After four days, the police supervisor told Mr. Fan
15 the police had completed their investigation, but Mr. Fan
16 would not be released until he signed an agreement.¹²
17

18 ¹¹ Although Mr. Dai testified that he knew Mr. Fan
19 was in detention and that the police were present during
20 his meeting with Mr. Fan, he asserts Mr. Fan negotiated
21 freely the terms of the agreement and that Mr. Fan even
22 suggested the inclusion of the arbitration clause. (Dai
23 Dep. 38:19-39:6; 93:20-94:18.) Whether Mr. Fan
24 negotiated voluntarily the terms of the agreement,
25 however, is a matter of law, not of fact.

26 ¹² Plaintiff claims Mr. Fan negotiated the terms of
27 the April 2007 Agreement. (Pl.'s Mot. at 4-5; see Defs.'
28 Reply SUF ¶ 11i.) The cited deposition testimony,
though, does not support this. (Pl.'s Mot. at 4-5.) According to Plaintiff, Mr. Fan testified that, after reviewing the agreement the police gave him to sign, he told the police he did not have enough money to pay the required initial payment. (Id. (citing Fan Dep. 88:3-25).) In response, the police determined he would pay \$300,000.00 as a first payment and the remainder would be averaged over the future payments. (Id.) This does not (continued...)

1 (Fan Decl. ¶ 15; Fan Dep. 96:11-13.) The agreement
2 provided that Eastern Tools would pay \$2.5 million to
3 settle the dispute over the allegedly non-conforming
4 equipment; required an initial payment of \$300,000.00 to
5 be paid to Plaintiff by April 30, 2007; and specified the
6 remaining amount would be paid in six monthly
7 installments of \$350,000.00 from May 2007 to October
8 2007. (Bell Decl. Ex. 3E.) The agreement also
9 designated Mr. Fan as the "Guarantor" and obligated
10 Eastern Tools to pay \$6,272,641.00 to Plaintiff if it did
11 not pay the \$2.5 million on schedule. (Id.) The
12 agreement specified that all disputes arising from its
13 performance would be submitted to arbitration before
14 CIETAC in Shanghai, China. (Id.)
15

16 The police released Mr. Fan on April 29 or 30, 2007.
17 (Fan. Decl. ¶ 15.) According to his testimony, Mr. Fan
18 believed he was released only after the police confirmed
19 they had received the initial payment of \$300,000.00.
20 (Fan Dep. 100:11-16; Fan Decl. ¶ 15.)
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25 ¹²(...continued)
26 amount to negotiation. Moreover, Plaintiff does not
27 provide a certified copy of the above cited deposition
28 testimony in the Liang Declaration. See Orr v. Bank of Am., 285 F.3d 764, 775 (9th Cir. 2002). Thus, the Court has no way to verify Plaintiff's assertion.

In June 2007, the creditors of the bankrupt Joint Venture voted not to approve the April 2007 Agreement because they thought Eastern Tools should pay more than \$2.5 million to settle the dispute.¹³ (See Pl.'s SUF ¶ 23; Fan Dep. 102:23-25; Dai Dep. 84:11-13.)

2. July 2007 Agreement

8 After release from prison, Mr. Fan remained in China
9 and traveled to various cities to conduct business. (Fan
10 Decl. ¶ 26; Fan Dep. 102:5-14; Pl.'s SUF ¶ 20.) He sent
11 a copy of the April 2007 Agreement to his lawyers in the
12 United States, but did not show the document to his
13 lawyer in China.¹⁴ (Fan Dep. 102:15-22.) According to
14 Mr. Fan, the Changzhou Public Security Bureau contacted
15 him at least ten times between April and July 2007. (Fan
16 Decl. ¶ 26.) In July, Mr. Fan received a telephone call
17 from Officer Huang, a policeman from Changzhou.¹⁵ (*Id.*)

¹³ Neither party discusses why Xuchu Dai asked Mr. Fan to sign the nearly identical July 2007 Agreement after the creditors had already rejected the earlier agreement's terms. (See Dai Dep. 83:14-22.)

21 ¹⁴ Mr. Fan testified he did not tell anyone else
22 about the circumstances surrounding the agreement
23 because, "this [was] an embarrassing incident in China."
(Fan Dep. 108:15-19.)

(continued...)

1 Officer Huang directed Mr. Fan to return to Changzhou to
 2 sign the April 2007 agreement again. (*Id.*) Mr. Fan
 3 believed that if he did not return and sign the
 4 agreement, the police would take him into custody again
 5 and detain him until he signed.¹⁶ (*Id.*)
 6

7 On July 26, 2007, Mr. Fan signed a second agreement
 8 with terms nearly identical to those in the April 2007
 9 Agreement.¹⁷ The agreement provided that Eastern Tools
 10 would pay \$2.5 million in monthly installments of
 11 \$350,000.00 to settle the dispute over the allegedly
 12 nonconforming shipment of equipment. (Bell Decl. Ex.
 13

14 ¹⁵(...continued)
 15 contradict the statement in his declaration that the
 16 police contacted him at least ten times *between* April and
 July 2007. (Fan Decl. ¶ 26.)

17 ¹⁶ Plaintiff attempts to dispute this fact by arguing
 18 Mr. Fan could have left China after his release in April
 19 2007. (See Pl.'s SGI ¶ 11r.) Whether Mr. Fan could have
 20 left China between April and July 2007, however, does not
 21 contradict Mr. Fan's assertion that when Officer Huang
 22 directed him in July to return to Changzhou to sign the
 23 agreement, he believed he would be taken into custody if
 24 he did not comply. Mr. Fan is a Chinese citizen and
 25 presumably would not have been free to leave China had
 26 the police decided to arrest him again.
 27

28 ¹⁷ Plaintiff claims Mr. Fan "freely negotiated" the
 July 2007 Agreement and that Mr. Fan even admits he made
 changes to it. (Pl.'s Mot. at 4-5; Pl.'s Opp'n at 9.)
 Mr. Fan's deposition testimony, however, belies this
 claim. Mr. Fan testified that Plaintiff drafted the
 agreement, Plaintiff's representative, Yongkang Shi, then
 directed him to read the draft, to make certain
 handwritten changes to the document, and to sign the
 agreement. (Fan Dep. 109:9-17.) Mr. Fan further
 testified, "They didn't need me to review it. I had to
 sign." (Fan Dep. 110:19-22.) As discussed below, this
 does not constitute negotiation.

1 5E.) The agreement credited the \$400,000.00 Defendants
2 had already paid. (Id.) If Eastern Tools failed to pay
3 the monthly installments on time, it then would owe
4 \$6,272,641.00 to Plaintiff. (Id.) Mr. Fan was again
5 listed as the guarantor and assumed joint responsibility
6 under the agreement. (Id.) The July 2007 Agreement also
7 included the same arbitration clause as the April 2007
8 Agreement. (Id.)

9
10 In December 2007, the creditors for the Joint Venture
11 approved the July 2007 Agreement and notified Defendants.
12 (Pl.'s SUF ¶ 30.)

13
14 **3. February 2008 Payment**

15 Eastern Tools made a payment of \$250,000.00 to the
16 Joint Venture in early February 2008.¹⁸

17
18
19
20 _____
21 ¹⁸ Plaintiff asserts Eastern Tools made the
22 \$250,000.00 payment in February 2008 "voluntarily" and
cites to the Arbitration Award at page 6. (See Pl.'s SUF
¶ 31.) First, whether the payment was "voluntary" for
purposes of ruling on Defendants' duress defense is a
matter of law not of fact. Secondly, the cited page does
not include a finding on whether the payment was
"voluntary," but merely states the payment was made on
February 5, 2008. (See Liang Decl. Ex. 5 at 6.)
Finally, Plaintiff asserts the police never called Mr.
Fan after 2007; however, in response to the question,
"Did you receive any calls from Chinese police officers
in 2008?", Mr. Fan responded during deposition, "Should
be no. I don't remember." (Fan Dep. 16:9-11.) Thus,
the Court does not conclude as a factual matter that the
payment was made "voluntarily."

1 **4. CIETAC Arbitration**

2 In May 2008, the bankruptcy estate for the Joint
3 Venture initiated the arbitration process. (Pl.'s SUF ¶
4 34.) In December 2008, Defendants filed an action in the
5 Nantong Intermediate People's Court of the People's
6 Republic of China challenging the validity of the July
7 2007 Agreement. (Id. ¶¶ 35-36.) In late April 2009, Mr.
8 Fan withdrew his challenge in the Nantong Court, and
9 participated in the CIETAC arbitration, but continued to
10 contest the validity of the July 2007 Agreement on the
11 grounds that he signed it under duress. (Id. ¶¶ 39, 42;
12 Liang Decl. Ex. 5 at 14-18.) On December 29, 2009, the
13 CIETAC panel ruled in favor of Plaintiff's claims and
14 denied Defendants' counterclaims. (Pl.'s SUF ¶ 50.)

15
16 **II. LEGAL STANDARD**

17 The United Nations Convention on the Recognition and
18 Enforcement of Foreign Arbitral Awards ("the Convention"
19 or "the New York Convention"), which has been ratified by
20 the People's Republic of China and the United States,
21 governs the "recognition and enforcement of arbitral
22 awards made in the territory of a State other than the
23 State where the recognition and enforcement of such
24 awards are sought. . . ." Convention on the Recognition
25 and Enforcement of Foreign Arbitral Awards Status,
26 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited July 16,
27
28

1 2012); Convention on the Recognition and Enforcement of
2 Foreign Arbitral Awards Treaty, June 10, 1958, 21 U.S.T.
3 2517, 330 U.N.T.A. 39 ("New York Convention"). The
4 United States Senate ratified the Convention on October
5 4, 1968, 9 U.S.C. §§ 201, et seq.; the Convention was
6 incorporated into the United States Code on July 31,
7 1970.

8

9 In Article V, the Convention sets out five grounds
10 for refusal that may be raised by parties and two grounds
11 that may be granted by the court sua sponte. Convention,
12 art. V. Respondent has the burden of establishing a
13 defense against enforcement under the Convention because
14 there is a strong presumption in favor of confirmation of
15 arbitral awards. See Polimaster Ltd. v. RAE Sys., Inc.,
16 623 F.3d 832, 836 (9th Cir. 2010) (citing Gould, 969 F.2d
17 at 770) ("[Respondent] has the burden of showing the
18 existence of a New York Convention defense.

19 [Respondent's] burden is substantial because the public
20 policy in favor of international arbitration is strong .
21 . . ."). The presumption in favor of confirmation is
22 based on the goal of the Convention, which is to
23 encourage the recognition of international arbitral
24 agreements. See Scherk v. Alberto-Culver Co., 417 U.S.
25 506, 520 n.15 (1974). Further, favoring the confirmation
26 of arbitral agreements, courts have adopted a narrow view
27 of the defenses enumerated in the Convention. See

28

1 Polimaster, 623 F.3d at 836 ("New York Convention
2 defenses are interpreted narrowly."); Gould, 969 F.2d at
3 770; Parsons & Whittemore Overseas Co. v. Societe
4 Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969
5 (2d Cir. 1974).

6

7 "The Convention mandates a summary procedure modeled
8 after federal motion practice to resolve motions to
9 confirm." Matter of Arbitration Between Trans Chemical
10 Ltd. and China Nat. Machinery Import and Export Corp.,
11 978 F. Supp. at 309. As the party opposing confirmation,
12 Defendants bear the burden of proof of establishing an
13 Article V reason prohibiting confirmation. See Gould,
14 969 F.2d at 770 (citing La Societe Nationale Pour La
15 Recherche v. Shaheen Natural Res. Co., 585 F. Supp. 57,
16 61 (S.D.N.Y. 1983), aff'd, 733 F.2d 260 (2d Cir. 1984)
17 (per curiam)). Absent a convincing showing that one of
18 these narrow exceptions applies, the arbitral award will
19 be confirmed. Fitzroy Eng'g, Ltd. v. Flame Eng'g, Inc.,
20 No. 94C2029, 1994 WL 700173, at *3 (N.D. Ill. Dec. 13,
21 1994); see also Biotronik Messund Therapiegeraete GmbH &
22 Co. v. Medford Medical Instrument Co., 415 F. Supp. 133,
23 136 (D.N.J. 1976); Indocomex Fibres Pte., Ltd. v. Cotton
24 Co. Int'l, Inc., 916 F. Supp. 721, 726 (W.D. Tenn. 1996);
25 Geotech Lizenz AG v. Evergreen Sys., 697 F. Supp. 1248,
26 1252 (E.D.N.Y. 1988).)

27

28

III. DISCUSSION

The Convention governs the Court's confirmation of the award in this case because the purported agreement was made "in a territory of a State other than the State where the recognition and enforcement" of the award is being sought. Convention, art. I(1). The parties do not dispute that the four jurisdictional prerequisites were met here.¹⁹

10 Plaintiff seeks confirmation of the arbitral award,
11 while Defendants argue the July 2007 Agreement was made
12 under duress and the Court should therefore decline to
13 recognize and enforce the award under Article V(1)(a),
14 (2)(a), or (2)(b).

A. Review of the Underlying Contract's Validity

At the outset, the Court must determine whether it can consider a contractual defense of duress in ruling on the confirmation of a foreign arbitral award under the Convention. The Court finds that it can. As Defendants contend correctly, a defense of duress can succeed as a

23 ¹⁹ A court may order arbitration if four conditions
24 are met: (1) there is agreement in writing to arbitrate
25 the dispute, (2) the agreement provides for arbitration
26 in territory of signatory to the Convention, (3) the
agreement to arbitrate arises out of a commercial legal
relationship, and (4) there is a party to the agreement
who is not an American citizen. Bautista v. Star
Cruises, 396 F.3d 1289, 1294 n.7 (11th Cir. 2005).
27 Plaintiff also brought its Motion to Confirm within the
28 three year statute of limitations under the Convention.
See 9 U.S.C. § 207.

1 defense to confirmation under Article V(1)(a), or (2)(b)
2 of the Convention. Duress is not, however, a defense
3 under Article V(2)(a).

4

5 **1. Article V(1)(a)**

6 Under Article V(1)(a), a court may refuse to enforce
7 an award if "the parties to the agreement . . . were,
8 under the law applicable to them, under some incapacity,
9 or the said agreement is not valid under the law to which
10 the parties have subjected it or, failing any indication
11 thereon, under the law of the country where the award was
12 made." Convention, art. V(1)(a). Plaintiff and
13 Defendants disagree on the law to which "the parties have
14 subjected" the arbitration agreement for purposes of
15 Article V(1)(a). Defendants argue throughout their
16 papers that American arbitration law applies. (See
17 Defs.' Mot.; Defs.' Opp'n.) Plaintiff argues simply that
18 the Court must defer to the determination of CIETAC,
19 which made its findings based on Chinese law. (Pl.'s
20 Mot. at 13.)

21

22 Although there is a dearth of case law addressing
23 defenses under Article V(1)(a), at least some courts have
24 found the "law to which the parties have subjected" the
25 agreement to be the law specified in the underlying
26 agreement's choice-of-law provision. See, e.g., Am.
27 Constr. Mach. & Equip. Corp. v. Mechanised Constr. of

28

1 Pak., 659 F. Supp. 426, 428-429 (S.D.N.Y. 1987). Here,
 2 while the July 2007 Agreement does not include a choice-
 3 of-law provision, CIETAC applied Chinese law in ruling on
 4 the parties' claims and counterclaims. (See Liang Decl.
 5 Ex. 5 at 36.) "[U]nder the New York Convention, the
 6 rulings of the [arbitrator] interpreting the parties'
 7 contract are entitled to deference."²⁰ Karaha Bodas Co.,
LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi
Negara, 364 F.3d 274, 290 (5th Cir. 2004) (deferring to
 10 arbitrator's choice-of-law determination); see also James
Ford, Inc. v. Ford Dealer Computer Servs., 56 Fed. Appx.
 12 324, 325 (9th Cir. 2003) (giving broad deference to an
 13 arbitrator's choice-of-law decision). Since the CIETAC
 14 arbitration panel applied Chinese law, there is no basis
 15 to rule on a duress defense under American law "unless
 16 the [arbitrator] manifestly disregarded the parties'
 17 agreement or the law." Id.; see also Carter v. Health
Net of Cal., Inc., 374 F.3d 830, 838 (9th Cir. 2004) ("As
 19 federal courts of appeals have repeatedly held, 'manifest
 20 disregard of the law' means something more than just an
 21 error in the law or a failure on the part of the
 22 arbitrators to understand or apply the law. It must be
 23

24

25 ²⁰ To clarify, the deference given to the
 26 arbitrator's choice-of-law decision is distinct from the
 27 deference given to the arbitrator's findings of fact with
 28 respect to an Article V defense. Here, the Court defers
 to CIETAC's application of Chinese law solely for the
 purpose of determining the "law to which the parties have
 subjected" the agreement.

1 clear from the record that the arbitrators recognized the
2 applicable law and then ignored it.").
3

4 Here, the Court does not find CIETAC's application of
5 Chinese law in ruling on Defendants' duress defense was a
6 "manifest disregard" of the law. The parties entered
7 into the agreement in China and provided that a Chinese
8 arbitration body would resolve any disputes arising out
9 of the contract. It was therefore reasonable for CIETAC
10 to apply Chinese law in arbitrating the dispute.

11
12 The Court does not consider further whether a defense
13 of duress would be successful under Article V(1)(a),
14 however, as the Court denies confirmation under Article
15 V(2)(b).²¹
16

17 **2. Article V(2)(a)**

18 Defendants next contend that the Court should deny
19 confirmation under Article V(2)(a), which provides that a
20 court may refuse confirmation if "the subject matter of
21 the difference is not capable of settlement by
22 arbitration under the law of that country." (Defs.' Mot.
23 at 6.) Defendants contend the "law of that country"
24 refers to the law of the country in which confirmation is
25 being sought, here the United States. (Defs.' Mot. at
26 _____

27

²¹ For this reason, the Court makes no findings as to
28 the merits of Defendants' duress defense under Chinese
law.

1 6.) Plaintiff does not object to this reasoning
2 directly, but maintains that the law requires the
3 arbitrator to decide whether the July 2007 Agreement is
4 enforceable. (Pl.'s Mot. at 13.)

5

6 Article V(2)(a) provides an extremely limited defense
7 to confirmation. The provision only covers disputes
8 which under domestic law would be "entrusted to the
9 exclusive competence of the judiciary." Parsons, 508
10 F.2d at 974 (citing American Safety Equip. Corp. v. J. P.
11 Maguire & Co., 391 F.2d 821, 822 (2d Cir. 1968) (finding
12 antitrust claims inappropriate for arbitration and
13 denying confirmation of arbitration award)). The July
14 2007 Agreement resolved a contract dispute over non-
15 conforming goods - a subject matter entirely capable of
16 "settlement by arbitration."

17

18 **3. Article V(2)(b)**

19 Article V(2)(b) of the Convention states that a
20 decision "may be refused" if "[t]he recognition or
21 enforcement of the award would be contrary to the public
22 policy of that country." Convention, art. V(2)(b).
23 While the Court has not found any case in which a
24 district court has declined to confirm a foreign arbitral
25 award under Article V(2)(b) based on a defense of duress,
26 courts have addressed whether the defense would undermine
27 enforcement under Article V(2)(b) and concluded that it

28

would.²² For instance, in Ameropa AG v. Havi Ocean Co.
LLC, the court found that "[e]nforcement would violate
this country's 'most basic notions of morality and
justice' if the defendant's due process rights had been
violated - for example, if defendant had been subject to
coercion or any part of the agreement had been the result
of duress." No. 10CIV3240 (TPG), 2011 WL 570130, at *2
(S.D.N.Y. Feb. 16, 2011) (interpreting Convention, art.
V(1), (2)(b)) (quoting Parsons, 508 F.2d at 974); see
also Ministry of Def. and Support for the Armed Forces of
the Islamic Republic of Iran v. Cubic Def. Sys., Inc.,
665 F.3d 1091, 1097 (9th Cir. 2011) (also quoting
Parsons); Transmarine Seaways Corp. v. Marc Rich & Co. A.
G., 480 F. Supp. 352, 358 (S.D.N.Y. 1979) ("Agreements
exacted by duress contravene the public policy of the
nation, [citation], and accordingly duress, if
established, furnishes a basis for refusing enforcement
of an award under Article V(b)(2) of the Convention.")
(citing Fluor Western, Inc. v. G. & H. Offshore Towing
Co., 447 F.2d 35, 39 (5th Cir. 1971) (discussing common-
law public policy against agreements formed under
unconscionably unequal bargaining positions)). In

24 ²² Consistent with this interpretation, the Ninth
25 Circuit has found that a party's incapacity at the time
of the signing of the underlying contract - a defense
26 which also vitiates consent - "is a basis on which the
district court could refuse to enforce an arbitration
27 award under the New York Convention: . . ." Seung Woo
28 Lee v. Imaging3, Inc., 283 Fed. Appx. 490, 493 (9th Cir.
2008).

1 Transmarine Seaways, the court stated categorically that
 2 if the underlying agreement was exacted by duress, the
 3 arbitration award could not stand. 480 F. Supp. at 358.

4

5 The Court also notes that considering duress as a
 6 defense under Article V(2)(b) is consistent with the
 7 Convention's provision on compelling arbitration under
 8 Article II.²³ See Lindo v. NCL (Bahamas) Ltd., 652 F.3d
 9 1257, 1262-63 (11th Cir. 2011) (noting the Convention's
 10 corresponding stages of enforcement). More often than
 11 not the issue of enforceability comes before courts on a
 12 motion to compel arbitration rather than on a motion to
 13 confirm an arbitral award. See China Minmetals
 14 Materials, 334 F.3d at 281. In those cases, the well-
 15 established precedent is that a meritorious defense of
 16 duress would undermine the enforcement of the arbitration
 17 agreement under Article II(3) of the Convention. See
 18 Chloe Z Fishing Co. v. Odyssey Re (London) Ltd., 109 F.
 19 Supp. 2d 1236, 1259 (S.D. Cal. 2000); see also DiMercurio
 20 v. Sphere Drake Ins. PLC, 202 F.3d 71, 79 (1st Cir. 2000)
 21 (fraud, mistake, duress, and waiver grounds to invalidate
 22 arbitration clauses under Article II(3)); Bautista v.

23

24

²³ "To implement the Convention, Chapter 2 of the FAA provides two causes of action in federal court for a party seeking to enforce arbitration agreements covered by the Convention: (1) an action to compel arbitration in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement, 9 U.S.C. § 207." Lindo, 652 F.3d at 1262-63.

1 Star Cruises, 396 F.3d 1289, 1302 (11th Cir. 2005)
2 (standard breach-of-contract defenses "such as fraud,
3 mistake, duress, and waiver" apply under Article II(3)).
4 If an agreement is "null and void" under Article II(3),
5 the underlying agreement to arbitrate is unenforceable
6 and the Court cannot compel arbitration. Chloe Z
7 Fishing, 109 F. Supp. 2d at 1258-59. Several
8 "internationally recognized defenses" render a contract
9 "null and void" under Article II; duress is one such
10 defense. Id. ("[I]t is well-established that . . .
11 internationally recognized defenses to contract formation
12 or public policy concerns of the forum nation . . .
13 make[] a valid agreement to arbitrate the subject of the
14 dispute unenforceable under Article II, section 3 of the
15 Convention."); see also DiMercurio, 202 F.3d at 79;
16 Bautista, 396 F.3d at 1302.

17
18 If a successful duress defense would undermine a
19 court's ability to compel arbitration under the
20 Convention, it would be unjust for the court to be unable
21 to consider this defense in confirming the award.

22
23 **a. Applicable Law**

24 Absent any precedent on what law to apply to a
25 defense of duress under Article V(2)(b), the Court
26 considers the law courts have applied in ruling on
27 contractual defenses under Article II(3) of the

1 Convention - the provision which allows a party to raise
2 a defense of duress to motions to compel arbitration.
3 Similar choice-of-law issues arise in cases which concern
4 the validity of an arbitration agreement under Article
5 II. Whether and how a court applies its domestic law to
6 determine if a valid agreement exists for purposes of
7 Article II(3) remains unsettled, however. Some district
8 courts have applied domestic state law to determine the
9 issue of validity. See, e.g., Javier v. Carnival Corp.,
10 No. 09CV2003-LAB (WMc), 2010 WL 3633173, at *3-4, 10-12
11 (S.D. Cal. Sept. 13, 2010) (applying domestic law to rule
12 on fraud and unconscionability defenses in determining
13 validity of underlying agreement under Article II(3))
14 (citing Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072
15 (9th Cir. 2007)).

16

17 At the same time, the inquiry into whether an
18 agreement is "null and void" under Article II(3) does not
19 begin with an analysis of state contract law. In Chloe Z
20 Fishing, the court stated "it is well-established that it
21 is not state law, but internationally recognized defenses
22 to contract formation or public policy concerns of the
23 forum nation, which makes a valid agreement to arbitrate
24 the subject of the dispute unenforceable under Article
25 II, section 3 of the Convention." 109 F. Supp. 2d at
26 1258-59. There, the court refused to consider the state
27 law defense of unconscionability - a defense not
28

1 articulated as one of the "internationally recognized
2 defenses" which would render an agreement unenforceable
3 under Article II(3). Id. at 1259; see also DiMercurio,
4 202 F.3d at 79; Bautista, 396 F.3d at 1302. While the
5 authorities cited clearly limit challenges to an
6 agreement's validity under Article II(3) to only those
7 "internationally recognized defenses," such as duress,
8 mistake, fraud, or waiver, the case law provides little
9 guidance on what law a court should apply to determine
10 whether one of these defenses is meritorious in a
11 particular case.

12

13 Perhaps more helpful is the line of cases addressing
14 the applicable law in determining the validity of
15 arbitration agreements with foreign choice-of-law
16 provisions. In those cases, courts apply domestic law to
17 determine the threshold issue of validity. For instance,
18 in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,
19 the Supreme Court clarified that "the first task of a
20 court asked to compel arbitration of a dispute is to
21 determine whether the parties agreed to arbitrate that
22 dispute." 473 U.S. 614, 626 (1985). In this initial
23 determination, a foreign choice-of-law provision does not
24 control and courts are to apply domestic law. Id. at
25 625; see also Sea Bowld Marine Group, LDC v. Oceanfast
26 Pty, Ltd., 432 F. Supp. 2d 1305, 1312 (S.D. Fla. 2006);
27 Kamaya Co. Ltd., v. Am. Prop. Consultants, Ltd., 91 Wash.
28

1 App. 703, 713-14 (Wash. Ct. App. 1998) (noting that
2 despite choice of law and forum selection clauses, it is
3 "axiomatic that courts must have some law to apply when
4 initially determining whether the parties agreed to
5 arbitrate a particular dispute" and finding that law in
6 the analytical framework of the FAA).

7

8 Similarly, in Britton v. Co-op Banking Group, the
9 Ninth Circuit held that a party who had not contracted to
10 a valid agreement had no standing to compel arbitration.
11 916 F.2d 1405, 1413 n.9 (9th Cir. 1990) ("Standing, of
12 course, is always a threshold issue. When evaluating a
13 motion to compel arbitration, the first determination is
14 whether the parties intended to contract for
15 arbitration.") (citing Van Ness Townhouses v. Mar
16 Industries Corp., 862 F.2d 754, 756 (9th Cir. 1988)). On
17 appeal after remand, the Ninth Circuit applied California
18 contract law, finding the parties had not formed a valid
19 arbitration agreement. Britton v. Co-Op Banking Group, 4
20 F.3d 742, 745 (9th Cir. 1993) (citing Martinez v. Socoma
21 Cos., Inc., 11 Cal. 3d 394 (1974)).

22

23 Moreover, as this Court's subject matter jurisdiction
24 arises under the Convention and Chapter 2 of the FAA, the
25 law under which the case "arises" arguably applies to the
26 question of whether these parties consented freely to the
27 agreement. See Chloe Z Fishing, 109 F. Supp. 2d at 1252;
28

1 Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp.
2 1229, 1234-36 (S.D.N.Y. 1992) (noting that the
3 "Convention, as a treaty, is the supreme law of the land,
4 U.S. Const. art. VI cl. 2, and controls any case in any
5 American court falling within its sphere of application"
6 such that "any dispute involving international commercial
7 arbitration which meets the Convention's jurisdictional
8 requirements, whether brought in state or federal court,
9 must be resolved with reference to that instrument");
10 Coenen v. R. W. Pressprich & Co., 453 F.2d 1209, 1211 (2d
11 Cir. 1972) ("Once a dispute is covered by the [Federal
12 Arbitration] Act, federal law applies to all questions of
13 [the arbitration agreement's] interpretation,
14 construction, validity, revocability, and
15 enforceability."). As federal arbitration law applies
16 state law to rule on the merits of the defense of duress,
17 the Court follows this approach. See Doctor's Assocs.,
18 Inc. v. Casarotto, 517 U.S. 681, 687 (1996) ("generally
19 applicable contract defenses, such as fraud, duress, or
20 unconscionability, may be applied to invalidate
21 arbitration agreements without contravening [9 U.S.C. §
22 2]"); see also Al-Safin v. Circuit City Stores, Inc., 394
23 F.3d 1254, 1257 (9th Cir. 2005).
24

25 Finally, the Court notes that applying Chinese
26 contract law in ruling on a defense of duress under
27 Article V(2)(b) would subvert the purpose of the
28

1 Convention. "Article V(2) of the Convention provides
2 that a United States court is not required to enforce an
3 agreement if its subject matter is not capable of
4 arbitration in the United States, or if enforcement of
5 the arbitral award would be contrary to American public
6 policy." Sarhank Group v. Oracle Corp., 404 F.3d 657,
7 661 (2d Cir. 2005) (internal citation omitted). In order
8 to determine whether the award is contrary to American
9 public policy, the Court must apply federal arbitration
10 law. Id.

11

12 Accordingly, the Court applies California state
13 contract law in ruling on Defendants' duress defense.
14

15 **b. Standard of Review**

16 The Court's review of a defense of duress under
17 Article V(2)(b) is highly circumspect. The public policy
18 behind both the FAA and the Convention strongly favors
19 arbitration, and "the party opposing enforcement of an
20 arbitral award has the burden to prove that one or more
21 of the defenses under the New York Convention applies."

22 Encyclopaedia Universalis S.A. v. Encyclopaedia
23 Britannica, Inc., 403 F.3d 85, 90 (2d Cir. 2005) (citing
24 Europcar Italia, S.p.A. v. Maiellano Tours, Inc., 156
25 F.3d 310, 313 (2d Cir. 1998)); see also Compagnie Noga
26 D'Importation et D'Exportation, S.A. v. The Russian
27 Federation, 361 F.3d 676, 683 (2d Cir. 2004). "The

28

1 burden is a heavy one, as 'the showing required to avoid
2 summary confirmation is high.'" Id. "Under the
3 Convention, [a] district court's role in reviewing a
4 foreign arbitral award is strictly limited." Yusuf Ahmed
5 Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d
6 15, 19 (2d Cir. 1997) (internal quotation marks omitted).
7 "A federal court cannot vacate an arbitral award merely
8 because it is convinced that the arbitration panel made
9 the wrong call on the law." Wallace v. Buttar, 378 F.3d
10 182, 190 (2d Cir. 2004); see also Telenor Mobile Commc'ns
11 AS v. Storm, LLC, 524 F. Supp. 2d 332, 344 (S.D.N.Y.
12 2007), aff'd, 584 F.3d 396 (2d Cir. 2009).

13

14 Despite the limited scope of this Court's review and
15 the relative lack of guiding precedent, the Court
16 nevertheless concludes that it can consider Defendants'
17 defense of duress.

18

19 **B. Duress**

20 Defendants argue that Mr. Fan was under duress in
21 July 2007 because his fear of detention deprived him of
22 his free will. (Defs.' Mot. at 8-10; Fan Decl. ¶ 26.)
23 Plaintiff contends the July Agreement was not made under
24 duress because Mr. Fan could have left China between
25 April and July 2007, but instead negotiated the July
26 Agreement freely. (Pl.'s SGI ¶ 11r; Pl.'s Mot. at 4-5;
27 Pl.'s Opp'n at 9.)

28

1 Under California law, a contract is voidable if the
 2 agreement was made under duress. California codified the
 3 common law rule of duress in Civil Code Section 1569,²⁴
 4 but that standard has since been relaxed. In re Marriage
 5 of Baltins, 212 Cal. App. 3d 66, 84 (1989). Today,
 6 "[d]uress generally exists whenever one is induced by the
 7 unlawful act of another to make a contract or perform
 8 some other act under circumstances that deprive him of
 9 the exercise of free will." Tarpy v. Cnty. of San Diego,
 10 110 Cal. App. 4th 267, 276 (2003). A party must show
 11 duress by a preponderance of the evidence. In re
 12 Marriage of Balcof, 141 Cal. App. 4th 1509, 1523 (2006).

13
 14 A contract is also voidable if a party's assent was
 15 the result of the threat of duress, or "menace."²⁵ See
 16 Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123
 17 (1966). There are various ways in which a threat may be
 18 improper. For instance, threats of criminal prosecution
 19 or the use of the civil process constitute improper
 20 threats to induce a party's assent to a contract.

21
 22 ²⁴ "Duress consists in: (1) Unlawful confinement of
 23 the person of the party . . . ; (2) Unlawful detention of
 24 the property of any such person; or (3) confinement of
 such person, lawful in form, but fraudulently obtained,
 or fraudulently made unjustly harassing or oppressive."
 Cal. Civ. Code § 1569.

25 ²⁵ "Menace consists in a threat: (1) Of such duress
 26 as is specified in Subdivisions 1 and 3 of [Cal. Civ.
 27 Code § 1569]; (2) Of unlawful and violent injury to the
 28 person or property of any such person as is specified in
 [Cal. Civ. Code § 1569]; or, (3) Of injury to the
 character of any such person." Cal. Civ. Code § 1570.

1 Restatement 2d, Contracts § 176(1)(b)-(c); see Shasta
2 Water Co. v. Croke, 128 Cal. App. 2d 760, 764 (1954). It
3 is also improper for a party to threaten to use its power
4 for illegitimate means if the resulting agreement is not
5 on fair terms. Restatement 2d, Contracts § 176(2)(c).
6 Finally, a threat may be improper if a party's previous
7 unfair dealing increases significantly the chance of
8 inducing the other party's assent, and the agreement
9 benefits the threatening party unfairly. Id.

10

11 In addition to statutory duress and menace,
12 California recognizes economic duress as a basis for
13 vitiating a coerced party's consent to an agreement.
14 CrossTalk Productions, Inc. v. Jacobson, 65 Cal. App. 4th
15 631 (1998). This doctrine applies "when one party has
16 done a wrongful act which is sufficiently coercive to
17 cause a reasonably prudent person, faced with no
18 reasonable alternative, to agree to an unfavorable
19 contract." Id. at 644. To determine if a party had a
20 reasonable alternative depends on whether "a reasonably
21 prudent person would follow the alternative course, or
22 whether a reasonably prudent person might submit." Id.

23

24 A party may also void a payment on a contract if such
25 payment was made while under duress. See Berrien v. New
26 Raintree Resorts Int'l., LLC, 176 F.R.D. 355, 363 (N.D.
27 Cal. 2011).

28

1 Duress for this purpose is shown 'where, by
2 reason of the peculiar facts a reasonably
3 prudent man finds that in order to preserve his
4 property or protect his business interests it is
necessary to make a payment of money which he
does not owe and which in equity and good
conscience the receiver should not retain.'

5 Steinman v. Malamed, 185 Cal. App. 4th 1550, 1558 (2010)
6 (quoting Western Gulf Oil Co. v. Title Ins. & Trust Co.,
7 92 Cal. App. 2d 257, 266 (1949)).

8
9 The circumstances surrounding the July 2007 Agreement
10 deprived Mr. Fan of his free will, and thus, Defendants
11 did not consent to the agreement. In April 2007, just
12 three months before Mr. Fan signed the agreement, the
13 Changzhou police:

- 14 • Arrested and detained Mr. Fan for at least
15 twelve days without charging him with a crime,
16 (Fan Decl. ¶¶ 12-13, 15; Fan Dep. 100:11-16; Zhu
17 Dep. 8:20; 60:14-61:17);
18 • Barred Mr. Fan from speaking with an attorney
19 about his arrest, (Defs.' Reply SUF ¶ 11g; Wu
20 Dep. 35:7-25; 36:1-5);
21 • Instructed an attorney that he could only advise
22 Mr. Fan to sign the April 2007 Agreement, (Id.);
23 • Told Mr. Fan, after detaining him for four days,
24 that even though the police investigation had
25 been completed, they would not release Mr. Fan
26 until he signed the April 2007 Agreement, (Fan
27 Decl. ¶ 15; Fan Dep. 96:11-13); and
28

- 1 • Released Mr. Fan only after confirming the first
2 payment on the April 2007 Agreement - totaling
3 \$300,000.00 - had been received, which was at
4 least eight days after the police had closed
5 their investigation. (Fan Decl. ¶ 15; Fan Dep.
6 100:11-16.)
7

8 Following Mr. Fan's arrest and up until he signed the
9 July Agreement, the Changzhou Public Security Bureau
10 contacted Mr. Fan at least ten times. (Fan Decl. ¶ 26.)
11 Thus, when Officer Huang called Mr. Fan and directed him
12 to return and sign the July 2007 Agreement, Mr. Fan
13 believed reasonably that if he did not return and sign
14 the agreement, the police would detain Mr. Fan again
15 until he signed.²⁶ (Fan Decl. ¶ 26.)
16

17 Additionally, the terms of the July 2007 Agreement,
18 when viewed in contrast with those to which the parties
19 agreed in December 2006, further indicate Mr. Fan did not
20 assent freely to the agreement. In December, the parties
21 agreed Eastern Tools would retain the allegedly defective
22 equipment and pay \$2 million to the Joint Venture. (Fan
23 Decl. ¶ 11; Pl.'s Mot. at 3.) The July Agreement's
24 terms, however, increased the amount Eastern Tools would
25

26 ²⁶ While Plaintiff argues Mr. Fan could have left
27 China, the Court declines to find a Chinese citizen, who
28 has legitimate business to conduct in China, (Fan Decl. ¶ 26; Fan Dep. 102:5-14; Pl.'s SUF ¶ 20), must flee the country in order to preserve a duress defense.

1 pay by \$400,000.00; provided that if the monthly
2 installments were not paid timely, then Defendants would
3 owe \$6,272,641.00; and held Mr. Fan personally liable for
4 the entire amount. (Bell Decl. Ex. 5E.) The sharp
5 contrast in the terms of the two agreements, coupled with
6 the threatening circumstances surrounding Mr. Fan's
7 signing of the July 2007 Agreement, suggest strongly that
8 the agreement was not the result of the parties' free
9 assent.

10

11 Plaintiff presents no evidence disputing the above
12 facts. At the hearing, Plaintiff argued the Court should
13 decline to consider Mr. Fan's statements describing his
14 detention, release, and the continued police contact, as
15 these statements represent hearsay and lack credibility.
16 As the Court notes above, however, Plaintiff had the
17 opportunity to cross-examine Mr. Fan during his
18 deposition, and thus, could have tested the credibility
19 of Mr. Fan's statements then. Plaintiff also could have
20 disputed the facts stated in Mr. Fan's declaration by
21 submitting contradictory declarations or deposition
22 testimony from the Changzhou police, Officer Huang, or
23 Mr. Dai, as well as any other relevant evidence. But,
24 Plaintiff did not present any evidence disputing Mr.
25 Fan's statements.

26

27

28

1 **1. Third Party Duress**

2 California allows an innocent party, whose assent was
 3 induced by a third party's use of duress, to void that
 4 contract under certain circumstances.²⁷ For instance, "a
 5 party who enters into a contract under duress may obtain
 6 rescission against another contracting party, who,
 7 although not responsible for the duress, knows that it
 8 has taken place and takes advantage of it by enforcing
 9 the contract, particularly a contract made with
 10 inadequate consideration." Chan v. Lund, 188 Cal. App.
 11 4th 1159, 1174 (2010). An innocent party may not void a
 12 contract due to a third party's use of duress when the
 13 other contracting party acted in good faith, without
 14 reason to know of the third party's use of duress, and
 15 relied materially on the contract. Id. (citing
 16 Restatement 2d, Contracts § 175, com. e, p. 479).²⁸

17

18 ²⁷ "A party to a contract may rescind the contract in
 19 the following cases: (1) If the consent of the party
 20 rescinding, or of any party jointly contracting with him,
 21 was given by mistake, or obtained through duress, menace,
 22 fraud, or undue influence, exercised by or with the
 23 connivance of the party as to whom he rescinds, or of any
 24 other party to the contract jointly interested with such
 25 party." Cal. Civ. Code § 1689(b).

26 ²⁸ "If a party's assent has been induced by the
 27 duress of a third person, rather than that of the other
 28 party to the contract, the contract is nevertheless
 voidable by the victim. There is, however, an important
 exception if the other party has, in good faith and
 without reason to know of the duress, given value or
 changed his position materially in reliance on the
 transaction. 'Value' includes a performance or a return
 promise that is consideration . . . so that the other
 party is protected if he has made the contract in good
 faith before learning of the duress." Restatement 2d,

(continued...)

1 The law treats a contracting party's use of duress
2 and a third party's use of duress, where the contracting
3 party was aware of such duress, the same. In Leeper v.
4 Beltrami, 53 Cal. 2d 195 (1959), the court stated that a
5 contracting party cannot take advantage of a third
6 party's use of duress knowingly. Id. at 206. There, in
7 an effort to stave off wrongful foreclosure proceedings,
8 the plaintiff conveyed her property for one-third of its
9 actual market-value. Id. at 205. The plaintiff sought
10 to rescind the conveyance but did not allege any active
11 wrongdoing on behalf of the purchaser. Id. The court
12 found the plaintiff stated a cause of action against the
13 purchaser because the purchaser was aware the plaintiff
14 needed to sell her property quickly, at less than actual
15 market-value, in order to protect herself from other
16 wrongful foreclosure proceedings. Id. at 206. In doing
17 so, the court indicated that mere knowledge of another
18 contracting party's predicament, i.e., that such party's
19 assent was induced by another party's use of duress, is
20 sufficient to create a right of rescission. Id.

21

22 Here, the following uncontested facts illustrate
23 Plaintiff was aware Mr. Fan signed the July 2007
24 Agreement under duress:

25

26

27

²⁸(...continued)
Contracts § 175, com. e, p. 479.

- 1 • Mr. Dai met with Mr. Fan to discuss the dispute
2 between Eastern Tools and the Joint Venture
3 while Mr. Fan was in police custody, (Dai Dep.
4 51:1-14);
5 • Mr. Dai testified that at the time he met with
6 Mr. Fan to negotiate the July 2007 Agreement he
7 believed Mr. Fan was in custody because one of
8 the shareholders in the Joint Venture had
9 accused Mr. Fan of contract fraud, (Dai Dep.
10 51:1-14.);
11 • The July 2007 Agreement listed Mr. Fan in his
12 personal capacity as a guarantor assuming joint
13 responsibility for the entire agreement even
14 though Mr. Fan had not agreed to this in any of
15 the negotiated agreements before his detention,
16 (Fan Dep. 109:9-17; Bell Decl. Ex. 5E); and
17 • Plaintiff's representative obtained Mr. Fan's
18 signature on the July 2007 Agreement without
19 allowing Mr. Fan to review the agreement, (Fan
20 Dep. 109:9-17; 110:19-22).
21

22 The uncontested facts show Mr. Fan was under
23 duress in July 2007 when he signed the agreement; thus,
24 he never consented freely to the agreement's terms.
25 Since Plaintiff knew of the circumstances undermining Mr.
26 Fan's capacity to assent freely, and nevertheless took
27 advantage of the situation to induce Mr. Fan to sign the
28

1 agreement, Defendants may void the agreement under
2 California law.

3

4 For purposes of ruling on the Motions, the Court
5 therefore finds Defendants have shown by a preponderance
6 of the evidence that the July 2007 Agreement was invalid
7 based on a defense of duress.

8

9 **2. Ratification**

10 Plaintiff argues that even if Mr. Fan entered into
11 the July 2007 Agreement under duress, Defendants ratified
12 the agreement when Mr. Fan authorized the first payment
13 in February 2008. (Pl.'s Opp'n at 11-12.) Defendants
14 contend Mr. Fan remained under duress when he authorized
15 this payment. (Defs.' Opp'n at 15.)

16

17 "A contract which is voidable solely for want of due
18 consent, may be ratified by a subsequent consent." Cal.
19 Civ. Code § 1588. Whether a party ratified a voidable
20 contract depends primarily on the party's intention, as
21 demonstrated by his or her declarations, acts, or
22 conduct. Esau v. Briggs, 89 Cal. App. 2d 427 (1948).
23 The test for ratification is "whether the releasor with
24 full knowledge of material facts entitling him to rescind
25 has engaged in some unequivocal conduct giving rise to an
26 inference that he intended his conduct to amount to a
27 ratification." Union Pac. R. Co. v. Zimmer, 87 Cal. App.
28

1 2d 524, 532 (1948). "Whether the releasor has such
2 knowledge, or whether retention has been for an
3 unreasonable length of time, are normally questions for
4 the trier of fact." Aikins v. Tosco Refining Co., Inc.,
5 No. C-98-00755-CRB, 1999 WL 179686, at *4 (N.D. Cal. Mar.
6 26, 1999) (applying Zimmer test). In a summary
7 proceeding such as this, the Court decides questions of
8 fact based on the evidence submitted. See Matter of
9 Arbitration Between Trans Chemical Ltd. and China Nat.
10 Machinery Import and Export Corp., 978 F. Supp. at 309.

11

12 While Defendants bear the burden of presenting
13 evidence sufficient to establish a defense of duress,
14 Plaintiff must present some evidence showing Mr. Fan
15 ratified the agreement in order to sustain their
16 ratification argument.²⁹ See Aikins, 1999 WL 179686, at
17 *6 (party asserting ratification did not present evidence
18 sufficient to show as a matter of law that opposing party
19 ratified agreement). Plaintiff presents no evidence to
20 establish Plaintiff ratified the July 2007 Agreement.
21 The only facts Plaintiff cites in support of its
22 ratification argument are: 1) Defendants made the

23

24

25 ²⁹ While "the party opposing enforcement of an
arbitral award has the burden to prove that one or more
26 of the defenses under the New York Convention applies,"
Encyclopaedia Universalis, 403 F.3d at 90, this does not
27 eviscerate completely the burden on Plaintiff to present
28 some evidence to support an asserted fact or legal
argument.

1 February payment; and 2) Mr. Fan was not contacted by
2 Chinese police after signing the July 2007 Agreement.

3

4 First, the fact that Defendants made the payment, on
5 its own, does not demonstrate Defendants ratified the
6 agreement. Plaintiff does not show Mr. Fan had "full
7 knowledge of material facts entitling him to rescind,"
8 nor that his conduct when he made the payment created "an
9 inference that he intended his conduct to amount to a
10 ratification." See Union Pac. R. Co., 87 Cal. App. 2d at
11 532. If Mr. Fan remained under duress in February 2008,
12 the payment would not have been voluntary and would not
13 have constituted a ratification. See Rakestraw v.
14 Rodrigues, 8 Cal.3d 67, 73 (1972) (no ratification if
15 adoption of contract is only a result of duress or
16 misrepresentation); Cf. Aikins, 1999 WL 179686, at *6
17 (noting evidence supported finding of ratification where
18 plaintiff conceded he accepted benefits under the
19 agreement *after* regaining mental functions and *after* he
20 understood terms of agreement, but holding defendant
21 still failed to show ratification as a matter of law).

22

23 Secondly, Mr. Fan's deposition testimony does not
24 entirely support Plaintiff's argument that the police
25 never contacted Mr. Fan after July 2007. In response to
26 the question, "Did you receive any calls from Chinese
27 police officers in 2008?", Mr. Fan stated, "Should be no.
28

1 I don't remember." (Fan. Dep. 16:9-11.) Other than
2 citing this deposition testimony, Plaintiff presents no
3 evidence showing Mr. Fan's state of mind had shifted by
4 February 2008 so that he no longer feared being arrested
5 if he did not comply with the July 2007 Agreement. (See
6 Pl.'s SUF.)

7

8 The Court finds a sufficient temporal connection
9 existed between Mr. Fan's arrest in April 2007, the
10 telephone calls from the Public Security Bureau between
11 April and July 2007, the order from Officer Huang in July
12 2007, and the first payment in February 2008, to support
13 Defendants' claim that Mr. Fan continued to fear possible
14 detention if he did not authorize the first payment. As
15 Plaintiff does not present evidence to show Mr. Fan had
16 full knowledge of the facts entitling him to rescind,
17 Plaintiff's ratification argument fails.

18

19 **3. Act of State**

20 Plaintiff next argues the Court may not rule on
21 Defendants' duress defense because, under the act of
22 state doctrine, the Court cannot inquire into the
23 validity of the acts of the Changzhou Public Security
24 Bureau. (Pl.'s Opp'n at 14.) Defendants contend the act
25 of state doctrine has no application here. (Defs.' Opp'n
26 at 16.)

27

28

1 "The act of state doctrine in its traditional
2 formulation precludes the courts of this country from
3 inquiring into the validity of the public acts a
4 recognized foreign sovereign power committed within its
5 own territory." Banco Nacional de Cuba v. Sabbatino, 376
6 U.S. 398, 401 (1964). Here, however, the Court is not
7 ruling on the validity or legality of Mr. Fan's arrest.
8 The Court makes no findings as to whether his arrest was
9 legitimate under the laws of the People's Republic of
10 China. The only holding the Court reaches is that, under
11 California law, Mr. Fan could not properly consent to an
12 agreement when he held a reasonable belief that he would
13 be detained if he did not sign. Thus, the act of state
14 doctrine has no bearing on the Court's ruling in this
15 case.

16

17 **C. Denying Enforcement**

18 Having found Mr. Fan entered into the July 2007
19 Agreement under duress, the Court denies confirmation of
20 the arbitral award under Article V(2)(b). While it may
21 be unusual for a court to deny confirmation under Article
22 V(2)(b), it is equally unusual for a court to enforce
23 contracts created without one party's consent and
24 complied with out of fear of imprisonment. The Court
25 will not wield its power to enforce contracts which would
26 be wholly unenforceable under domestic laws. See
27 Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110
28

1 (2d Cir. 1980) ("an award may be set aside if it compels
2 the violation of law or is contrary to a well accepted
3 and deep rooted public policy"). The Convention does not
4 mandate categorical confirmation of awards; rather, the
5 Article V(2) defenses contemplate courts will consider
6 domestic laws in confirming an award. Article V(2)(b)
7 would lack any meaning if a court could not rule against
8 confirmation when the "defendant had been subject to
9 coercion or any part of the agreement had been the result
10 of duress." Amerropa AG, 2011 WL 570130, at *2. Here,
11 the July 2007 Agreement was a result of duress and the
12 Court will not confirm the arbitral award.

13

14 **IV. CONCLUSION**

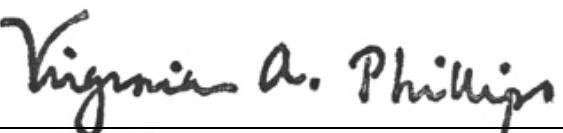
15 For the foregoing reasons, the Court DENIES
16 Plaintiff's Motion to Confirm and GRANTS Defendants'
17 Motion to Deny Confirmation.

18

19 **IT IS SO ORDERED.**

20

21 Dated: July 30, 2012

22 
VIRGINIA A. PHILLIPS
United States District Judge

23

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